IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN

MONDAY, THE 20TH NOVEMBER 2006 / 29TH KARTHIKA 1928

SA.No. 6 of 1994(A)

AS.190/1991 of SUBORDINATE JUDGE.S.C.,THALASSERY
OS.283/1990 of PRL.M.C.,KANNUR
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APPELLANTS:

1. POYIL ROHINI,
D/O.MATHA,
RETIRED TEACHER,
KANHARODE DESOM.

2. POYIL VAISHNAVI,
KANHARODE AMSOM,
PURAVOOR DESOM.

BY ADV. SRI.A.MOHAMED MUSTAQUE
SRI.SHEJI P.ABRAHAM

RESPONDENTS:

1. PUTHIYAPURAYIL KANAMADATHIL NARAYANI,
W/O.KUMARAN MASTER,
KANHARODE AMSOM,
PURAVOOR DESOM,

CHILDREN

2. CHANDRAMTHI,
W/O.GOPALAN,
P.O.MAMBA, (VIA) ANJARAKANDY.

3. PAVITHRAN,
S/O.KUMARAN MASTER,
OF DO-DO

4. MUKUNDAN,
S/O.KUMARAN MASTER OF DO-DO.

5. PRAMEELA, W/O.SUBHAN,
PREETHU TIMBER TRADERS,
59, M.T.H.ROAD, VILLIVAKAM,
MADRAS 600119.

6. PRASANNAKUMARI,
W/O.JANARDHANAN,
MUNDERI AMSOM, DESOM,
P.O.MUNDERI (VIA) EACHUR.

7. MANHERI ODAYOTH ANASOOYA DEVI,
W/O.DAMODARAN NAMBIAR,
KANHIRODE AMSOM DESOM,
P.O.KANHIRODE VIA KOODALI.

BY ADV. SRI.O.RAMACHANDRAN NAMBIAR, &
SHEEJA DIVAKARAN FOR R7
SRI.O.V.MUSTAFA ZAFEER R1 TO R6

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD 20.11.06, ALONG WITH SA NO. 570 OF 1993 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

NONE APPEARS FOR THE APPELLANTS. HENCE THIS APPEAL IS DISMISSED FOR DEFAULT.

20.11.2006 SD/- THOTTATHIL B RADHAKRISHNAN,JUDGE

ORDER ON CMP NO.822/2001 IN S.A.No.6 of 1994O;/

// DISMISSED//

20.11.2006 SD/- THOTTATHIL B RADHAKRISHNAN,JUDGE

/TRUE COPY/

P.A.TO JUDGE

M.SASIDHARAN NAMBIAR,J.

S.A.NO.6/1994 & 570/1993

Dated 15th October 2007

J U D G M E N T

Appellants are plaintiffs respectively in O.S.211/1990 and 283/1990 before Munsiff court, Kannur. Plaint A schedule property in both the suits is the same property. Plaint B schedule property in O.S.211/1990 consists of plaint C schedule property in O.S.211/1990 and plaint B schedule property in O.S.283/1990. Plaint A schedule property admittedly originally belonged in jenm right to Kurumathoor Illam. As per kuzhikanam lease of 1928 it was in the possession of Kunhonakkan. Kunhonakkan had two wives. Kumaran Master is the son in his first wife. Plaintiffs in both suits are the children of Kunhonakkan in his second wife Matha. The children subsequently divided the property under Ext.A3 partition deed. Plaint A schedule property is item No.3 of A schedule to Exts.A3 partition deed. First respondent is widow and respondents 2 to 6 are the children of deceased Kumaran Master. Seventh

respondent is the assignee of plaint B schedule property from respondents 1 to 6. Admittedly Puravoor Aided L.P.School is being run in plaint C schedule property. Remaining portion of plaint B schedule property is plaint B schedule property in O.S.283/1990, which consists of a well and surrounding land used by the school. Kumaran Master was admittedly managing the school as its Manager. After his death, his legal heirs respondents 1 to 6, assigned plaint B schedule property in favour of seventh respondent under Ext.B1 sale deed stating that said property was obtained by Kumaran Master on an oral lease from Kunhonakkan. While so, O.S.290/1978 was admittedly filed by plaintiff in O.S.211/1990 seeking a decree for permanent prohibitory injunction restraining respondents 1 to 7 from running the school. After the trial that suit was later dismissed. O.S.211/1990 was filed seeking a decree for declaration that Ext.B1 assignment deed executed by respondents 1 to 6 in favour of seventh respondent is a sham document as there was no oral lease in favour of Kumaran Master and respondents 1 to 6 have no right to transfer the property to seventh respondent and Ext.B1 assignment deed is not valid and binding on plaintiff. A

decree for recovery of possession of plaint C schedule property except the school building and building site was also sought. In O.S.283/1990 plaintiffs sought an identical relief as sought for by plaintiff in O.S.211/1990 in respect of plaint A schedule property. A decree for permanent prohibitory injunction in respect of plaint B schedule property therein, which is plaint B schedule property in O.S.211/1990 excluding plaint C schedule property therein, was sought contending that plaintiffs are in possession of the said 3 cents of property. Respondents 1 to 6 filed joint written statement contending that plaintiffs have no right over plaint B schedule property which is 10 cents including school building and appurtenant land. It was contended that Kumaran Master had constructed building in the property obtained by him on oral lease from Kunhonakkan and thereafter he constructed the building and was running Puravoor Aided L.P.School in his own name and Kunhonakkan had no right over the school building or 10 cents of the property obtained on lease and after death of Kumaran Master his rights devolved on respondents 1 to 6 and under Ext.B1 they transferred the right over the property in favour of seventh respondent and from

1963 onwards 10 cents was in the continuous, open and uninterrupted possession of respondents and even if plaintiffs have any right it is lost by adverse possession and limitation. Similar written statement was filed in other suit also. Trial court tried both the suits jointly.

2. On the evidence of Pws.1 and 2 the respective plaintiffs and DW1, Exts.A1 to A21, B1 to B15 trial court dismissed O.S.283/1990 and granted decree in O.S.211/1990 declaring that Ext.B1 assignment deed executed by respondents 1 to 6 in favour of seventh respondent is not binding on plaintiffs and directing respondents to surrender vacant possession of plaint C schedule property, other than the school building and building site within two months. Finding that no evidence was adduced in support of the oral lease in favour of Kumaran Master, trial court did not enter a specific finding on whether there was an oral lease of Kumaran Master. On the other hand, holding that defendants have not requested a reference to the Land Tribunal, learned Munsiff held that in any case it is not for that court to find whether predecessor of respondents 1 to 6 had any right over the property on

the basis of oral lease. Respondents challenged the decree granted in O.S.211/1990 before Sub court, Thalassery in A.S.174/1991. Challenging dismissal of O.S.283/1990 plaintiffs filed A.S.190/1991. Learned Sub Judge disposed both appeals as per common judgment dated 30/3/1993. First appellate court found that plaintiffs did not dispute the right of seventh respondent to run the school. It was also found that seventh respondent was running the school from the date of Ext.B1 assignment deed and evidence establish that school and appurtenant land was being enjoyed by seventh respondent and plaintiffs in O.S.283/1990 is not in possession of 3 cents namely, plaint B schedule property therein, which is part of plaint B schedule 10 cents in O.S.211/1990. Learned Sub Judge also found that said property and entire plaint C schedule property in O.S.211/1990 is absolutely necessary for running the school and in such circumstances plaintiff in O.S.211/1990 is not entitled to decree for recovery of possession of plaint B schedule property which includes plaint B schedule property in O.S.283/1990. Hence a modified decree was passed declaring that plaintiff in O.S.211/1990 is entitled to recovery of possession of

plaint A schedule property, excluding plaint B schedule property and that Ext.B1 is valid and plaint B schedule property belongs to seventh respondent under Ext.B1. Though cross objection was filed by plaintiff in O.S.211/1990 that was also dismissed. Challenging the modified decree in A.s.174.1991, S.A.570/1993 was filed. Challenging the concurrent decree in O.S.283/1990 plaintiffs filed S.A.6/1994. Both appeals were admitted formulating the following substantial questions of law.

> 1) Whether first appellate court was justified in ignoring the claim for title raised by plaintiffs over the property sought to be recovered, when evidence establish that title vests with plaintiffs.
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> 2) Whether first appellate court was justified in reversing the judgment of the trial court when contrary plea was raised on the basis of oral lease as well as ouster and adverse possession.

3. Learned counsel appearing for appellants and respondents were heard.

4. It is admitted case that plaint A schedule property originally belonged to Kunhonakkan. Plaintiffs are claiming title to plaint A schedule property under

Ext.A1 Will executed by Kunhonakkan bequeathing his rights in favour of wife and children including plaintiffs and subsequent Ext.A3 partition deed entered into by the legatees of the Will whereunder plaintiffs were allotted plaint A schedule property. Plaint B schedule property is in O.S.211/1990 is part of plaint A schedule property. It is also admitted case that plaint B schedule property in O.S.283/1990 together with plaint C schedule property in O.S.211/990 is the plaint B schedule property in O.S.211/1990. Puravoor Aided L.P.School is being run in the plaint C schedule property. Plaintiffs do not seek any relief in respect of the school building or the land occupied by the building. Though appellant in S.A.570/1993 had earlier filed O.S.290/1978, seeking a decree for permanent prohibitory injunction restraining respondents 1 and 7 from running the school contending that the school building belongs to them it was admittedly dismissed and that has become final. It is for that reason plaintiffs have not sought any relief in respect of running of the school. What is claimed by the appellants is declaration of title and recovery of possession of remaining portion of plaint B schedule property. Though plaintiffs in

O.S.283/1990 contended that plaint B schedule property therein is in the possession of appellants in S.A.6/1994, trial court and first appellate court found that plaint B schedule property is actually the appurtenant land to the school and is in the possession of seventh respondent, assignee of respondents 1 to 6. It is for that reason no decree for injunction was granted as sought for in O.S.283/1990. Declaration sought for in both the suits was declaration that oral lease set up by respondents 1 to 6 in favour of Kumaran Master is not correct and respondents 1 to 6 have no right over plaint B schedule property and for recovery of possession of plaint C schedule property. What was contended by respondents in their written statement is that oral lease was obtained by Kumaran Master from the father Kunhonakkan in respect of 10 cents, which is plaint B schedule property and he constructed a school building and was running the school in his own name since then and reiterating that case Ext.B1 sale deed was executed. Lease set up by respondents in respect of plaint schedule property is a lease coming under Kerala Land Reforms Act. Therefore, question to be decided in both the suits is whether Kumaran Master, the

predecessor in interest of respondents was a tenant of plaint B schedule property in O.S.211/1990. Trial court though appreciated that case, did not consider the question of oral lease or the tenancy claimed by respondents. Though it was stated that no evidence was adduced to prove the oral lease, trial court and stated that it is for Land Tribunal to decide the question and no request was made for a reference and it is not for civil court to decide whether Kumaran Master was a tenant of plaint B schedule property before the first appellate court respondents contended that trial court should have referred the question of tenancy to the Land Tribunal, as question of tenancy arises for consideration. But that aspect was not considered by the first appellate court. Instead first appellate court answered the question holding that respondents have been in possession of the property from 1963 onwards and therefore appellants are not entitled to the decree sought for. In the decreetal portion right of seventh respondent under Ext.B1 order, which could be upheld only if tenancy in respect of plaint B schedule property can be upheld was declared. Question is whether the dispute on tenancy that arises for consideration in the

suit could be decided without a reference to the Land Tribunal as provided under Section 125(3) Kerala Land Reforms Act.

5. It cannot be disputed that when claim for tenancy arises for decision in the suit that question can be decided only after a reference to the Land Tribunal as provided under Section 125(3) of Kerala Land Reforms Act. Respondents asserted that there was an oral lease in favour of Kumaran Master by original tenant Kunhonakkan, under whom appellants claim title. Appellants in the suits sought a declaration that there was no oral lease in favour of Kumaran Master and therefore his legal heirs, respondents 1 to 6 are not entitled to assign the property in favour of seventh respondent. The question whether there was an oral lease in favour of Kumaran Master definitely arises for consideration. In fact that is one of the main disputes to be resolved in the suit. As the question of tenancy set up by respondents and denied by appellants, arises for consideration, trial court should have referred that question to the Land Tribunal and decided the question as provided under Section 125 of Kerala Land Reforms Act. As the courts have decided the question without a

reference the judgments can only be set aside and suit remanded with a direction to the trial court to refer the question of tenancy to the Land Tribunal and decide the suits afresh in the light of the findings to be rendered by Land Tribunal.

6. In the result, both appeals are allowed. Decree and judgment passed by trial court as modified and confirmed by first appellate court in A.S.Nos.174/1991 and 190/1991 are set aside. O.S.211/1990 and 283/1990 are remanded to Munsiff court, Kannur for fresh disposal in accordance with law. Trial court shall refer the question of tenancy raised by respondents to the concerned Land Tribunal and decide the case in accordance with the findings. Parties are directed to appear before Munsiff court, Kannur on 15/11/2007.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

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M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.NO.570/93 & 6/94

15th October 2007

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